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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

NICOLE PATRICE SELECTMAN
Appellant-Petitioner

v.

STATE OF TEXAS
Appellee-Respondent

Appealed from:

The 144th Judicial District Court, Bexar County, Texas &

Fourth Court of Appeals, San Antonio, Texas;

Cause No(s).: [2015CR9689] & [04-18-00553-CR], respectively.

APPELLANT'S BRIEF

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ORAL ARGUMENT:
[REQUESTED].

IDENTITY OF PARTIES, COUNSEL, & TRIAL COURT

Pursuant to TEX. R. APP. P. 38.1(a) (West 2019):

The parties to this action are:

(1). Appellant: NICOLE PATRICE SELECTMAN, T.D.C.J.#: 02205755; Mountain View Unit; 2305 Ransom Road; Gatesville, TX 76528.

(2). Appellee: STATE OF TEXAS.

The trial attorneys are:

(1). For appellant: MARK J. McKAY, TBN: 13688520, 405 N. St. Mary's Street, Suite 1030; San Antonio, TX 78211; & LYNETTE M. BOGGS-PEREZ, TBN: 24084486, 310 S. St. Mary's Street, Suite 1910; San Antonio, TX 78205

(2). For the State: JOE A. MIMS, TBN: 24073633; & STEPHANIE FRANCO, TBN: 24093449; Bexar County District Attorney's Office, 101 W. Nueva St.; San Antonio, TX 78205.

The appellate attorneys are:

(1). For appellant: DEAN A. DIACHIN, TBN: 00796464, Bexar County Assistant Public Defender, 101 W. Nueva St., Suite 370; San Antonio, TX 78205.

(2). For the State: LAURA E. DURBIN, TBN: 24068556, Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710; San Antonio, TX 78205.

The trial court is:

(1). The HON. RAYMOND CRIS ANGELINI, sitting by designation, 144th District Court, Cadena Reeves Justice Center, 300 Dolorosa St., 2nd Floor, San Antonio, TX 78205.

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STATEMENT ON RECORD CITATIONS

The reporter's record will be cited as "RR" and the clerk's record will be cited as "CR." For example: (4 RR 135-137) is meant to reference "Reporter's Record, Volume 4, pages 135 through 137." The reporter's record consists of seven [7] volumes filed by a single court reporter (Ms. Maria E. Fattahi), and will be cited chronologically as follows:

(1 RR ___)	=	M. Fattahi, Vol. 1:	[Master Index];
(2 RR ___)	=	M. Fattahi, Vol. 2:	[Pretrial Motions & Voir Dire];
(3 RR ___)	=	M. Fattahi, Vol. 3:	[Trial Evidence];
(4 RR ___)	=	M. Fattahi, Vol. 4:	[Trial Evidence];
(5 RR ___)	=	M. Fattahi, Vol. 5:	[Charge, Closings, Verdict, & Punishment Evidence];
(6 RR ___)	=	M. Fattahi, Vol. 6:	[Punishment Charge, Verdict, & Sentencing];
(7 RR ___)	=	M. Fattahi, Vol. 7:	[Exhibits].

The clerk's record consists of a two [2] volumes filed by Bexar County District Clerk, Mary Angie Garcia, and will be cited as follows:

(1 CR ___)	=	M. Garcia, Vol. 1:	[Clerk's Record];
(2 CR ___)	=	M. Garcia, Vol. 1:	[Supp. Clerk's Record].

Trial exhibits will be cited: (7 RR ___ [SX-___]) & (7 RR ___ [DX-___]), respectively.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Ms. Nicole Patrice Selectman, appellant, files this petition by and through her appellate counsel of record, Mr. Dean A. Diachin, Bexar County Assistant Public Defender, and in support thereof would show this Honorable Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully renews her request that oral argument be granted. The grounds presented here are important to Texas jurisprudence because Texas law affords its citizens no greater right than the right to defend herself or a loved one. Here, the court of appeals has: (1) misconstrued Texas' statutes governing self-defense and defense of a third person; and (2) decided a question of state law in a manner that conflicts with applicable decisions of this Court. Oral argument would provide an invaluable opportunity for this Court to ask — and for the parties to answer — any questions that remain about how our state's self-defense laws should be applied.

STATEMENT OF THE CASE

Appellant was charged by indictment on September 28, 2015 with causing serious bodily injury with a deadly weapon to a household, dating, or family member,

on or about April 2, 2015.[1] (1 CR 6). Two [2] different jury trials then ensued; the first one hung with only a single vote favoring guilt, and the second reached a guilty verdict on June 14, 2018. *See* (2 CR 5) (containing affidavit by trial counsel stating, "[i]n the end, the [first] jury vote was 10 jurors "Not Guilty" and one "Guilty").

Following the instant punishment verdict on June 15, 2018, the trial court imposed sentence at ten [10] years' imprisonment and a zero dollar [$0.00] fine. (1 CR 5, 125); (6 RR 19). Appellant timely filed notice of appeal on August 6, 2018. (1 CR 40). All briefs were filed by June 23, 2019.

The court of appeals filed a memorandum opinion affirming appellant's conviction and sentence on March 25, 2020. *See* Appendix A (containing court of appeals' memorandum opinion).[2] A timely motion for *en banc* reconsideration was denied on May 22, 2020 and discretionary review was granted on November 25, 2020. This brief then followed on January 12, 2021.

1 The State thus charged one count of aggravated assault, a first degree felony punishable by "imprisonment in [T.D.C.J.] for life or any term of not more than 99 years or less than 5 years" and "a fine not to exceed $10,000." TEX. PENAL CODE §§ 12.32(a),(b); 22.02(b)(1) (West 2015).

2. Delivering a memorandum opinion was improper in this case because this appeal involves: (1) issues important to the jurisprudence of Texas; and (2) application of existing rules to a novel fact situation likely to recur in future cases. *See* TEX. R. APP. P. 47.4(a),(b) (describing circumstances in which memorandum opinions are inappropriate). The relevant rules of law were announced in: *Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018); *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017); *Krajcovic v. State*, 393 S.W.3d 282 (Tex. Crim. App. 2013); and, more recently, *Ebikam v. State*, PD-1199-18, 2020 WL 3067581 (Tex. Crim. App. June 10, 2020).

QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Did the court of appeals err in concluding appellant was properly refused instructions on self-defense and defense another because no evidence showed appellant reasonably believed a violent home intruder might cause imminent serious bodily injury or death to appellant or Erica Rollins on April 2, 2015? (4 RR 221-227).

QUESTION NO. 2

Did the court of appeals err in concluding appellant was properly refused instructions on self-defense and defense of another because no evidence showed that appellant "shot the gun and admitted to her otherwise illegal conduct," all in apparent contravention of this Court's confession and avoidance doctrine? (4 RR 221-227).

QUESTION NO. 3

Did the court of appeals use the harmless error rule to substitute its own opinion about the strength of appellant's request for instructions on self-defense and defense of a third person for actual findings of fact by a properly instructed jury? (4 RR 221-227).

GROUNDS FOR REVIEW

Ground for Review No. 1

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to support a rational jury finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 2, 2015. (4 RR 221-227).

Ground for Review No. 2

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the confession and avoidance doctrine because: (1) appellant never "flatly denied" an essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could rationally find that appellant either did fire, or otherwise cause, the shot that injured the complainant here. (4 RR 221-227).

Ground for Review No. 3

The intermediate appellate court effectively substituted its own harm analysis for findings of fact by a properly instructed jury. (4 RR 221-227).

STATEMENT OF FACTS.

In December 2014 former federal agent Roderick Malone met the complainant, Erica Rollins, in a bar. (4 RR 164). Rollins introduced Malone to a tall, thin, black man with short-cropped hair who Rollins said was her fiancé, "Mac". (4 RR 189). Sometime in the first half of 2015, Malone discovered a "massage therapy" ad on Craigslist featuring Rollins' picture, which Malone thought was odd. *See* (4 RR 168, 187) (stating, "[i]t was just in-call/out-call, which, to me … looked kind of suspect. Who does that if they're a professional?").

After answering an ad on Craigslist in August 2015, Regina Spears met Rollins and a man who Rollins described as her boyfriend, "Mac". *See* (4 RR 198-211) (stating, "I used to be licensed [massage therapist] so I was looking for an apprenticeship … and we just met that one time [at Chacho's on Perrin Beitel]"). Spears later testified, "I had [felt] a strong possibility that this job was not legitimate." (4 RR 203); *see also, e.g., Id.* (asking, "Q: And who was communicating the job requirements? A: Erica [Rollins]"); (4 RR 205) (stating, "[they started] discussing the possibility of sexual intercourse … after the massage if the client wanted to … [and] she talked about the pay and said that [Mac] would be getting a part of it for protection and … she would get a part of it for introducing me to the client");

(4 RR 215) (stating, "she [indicated]…[Mac] would be … the protector if I were to be hired, but he didn't do much of the talking").

Not long thereafter, in September or October 2015, Spears observed Rollins' photo among a collage of pictures hanging on a wall inside appellant's apartment. *See, e.g.*, (4 RR 206, 216-219) (stating, "I recognized … someone in the pictures and … [appellant said] she had known that person since they were kids); (4 RR 2015) (stating, "I had no idea that they knew each other until I saw the picture on the wall'). Appellant indicated that the picture was an "ex-girlfriend". (4 RR 219).

At trial, Rollins admitted that appellant and her young son, Taj, had moved in with Rollins in October 2014. (3 RR 19-20, 21). In the early morning of April 2, 2015, Rollins told appellant that "you [and your son] need to go ahead and just figure out what you're going to do. Get your things and move out." (3 RR 25). Rollins sought help at the Converse Police Department to evict appellant, but was told "this was more of a civil issue". (3 RR 8). Rollins then went home and found appellant sitting on a couch upstairs in their home. (3 RR 33). According to Rollins, the couple began to argue because Rollins had indeed been unfaithful. (3 RR 24, 33, 68-69, 80). Appellant drove Rollins to Northeast Methodist Hospital at 9:33 a.m. that same morning. (3 RR 187, 192).

E.R. doctor Nicole Malouf testified Rollins admitted that "an intruder had broken into the house and … [Rollins] was startled by that person at the top of the stairs and … that's when she got shot."[3] (4 RR 104). When appellant left the room, Rollins changed her story and said appellant shot her. (4 RR 100,104, 108). Malouf confirmed that Rollins injury was "serious". (4 RR 102).

Tracy Thomas also testified at trial. Thomas confirmed she has known Rollins and appellant since Thomas was fourteen [14] years old. (4 RR 118-119). The women have all remained friends ever since. *See, e.g.*, (4 RR 120) (admitting, "[before last year] I was closer to Erica [Rollins]"); (4 RR 133) (stating, "it's really difficult for me to be friends with [Rollins] knowing that she's lying on Nicole"). Thomas has never dated either Rollins or appellant. (4 RR 138).

Thomas encountered Rollins at a gay pride event in Atlanta, Georgia in 2017. There, Rollins told Thomas the following:

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3. Rollins also told Dr. Milouf that appellant had "saved her," as the following record reflects:

> Q: … [Y]ou did say that when you went to Northeast Baptist [sic] that an intruder had come into the house?
>
> A: Yes.
>
> …
>
> Q: And that there was this scuffle that ensued and that … [in,] your exact words[,] "Nicole saved me."
>
> A: Yes.

(3 RR 125).

> [Rollins] told me that Nicole was in trouble for something she didn't do. Specifically, she said that [Rollins] … had a boyfriend behind Nicole's back.
>
> Nicole came home from work one day and [Rollins] and her boyfriend were arguing about money and Nicole instantly came upstairs to [Rollins'] defense … and I guess there was a gun involved and the gun went off in the middle of the struggle.
>
> She didn't indicate … [who had the gun, only] that she was really afraid of … the boyfriend … [who] threatened that, if she didn't [agree to] testify against Nicole, he would kill her[.]
> …
> [Rollins] said that Nicole came into the house … heard a commotion … and tried to protect [Rollins].
>
> She didn't stat[e] if Nicole had a gun or if he had the gun[,] she just said … Nicole came upstairs and started scuffling with the boyfriend and in the midst of that the gun went off.

(4 RR 120, 129-130, 145); *see also, e.g.*, (4 RR 150) (stating, "[Rollins admitted] Nicole … started tussling with him because he was tussling with Erica"); (4 RR 141) (confirming, "I didn't know anything about it until [Rollins] told me [that Rollins had lied to the police]"). Rollins also admitted that the ex-boyfriend to whom Rollins owed money threatened not only Rollins, but appellant and her son as well. (4 RR 158); *see also* (4 RR 159) (stating, "he said he was going to kill all of them").

ARGUMENT

Ground for Review No. 1

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to support a rational jury finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 2, 2015.

A. Preservation.

During the guilt-innocence charge conference, appellant requested instructions on self-defense and defense of a third person, but was refused. *See* (4 RR 224) (stating, "That's denied, both of them"). The court of appeals later overruled appellant's points of error challenging those rulings, thus preserving each of the grounds presented here for review. TEX. R. APP. P. 33.1(a)(1),(2); 66.1 (West 2019).

B. Guiding Legal Principles.

1. Requested Defensive Instructions.

An instruction on a defensive issue must be given if the record contains "some evidence" to support the instruction, even if the evidence is weak, contradicted, or disbelieved by the trial court. *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016). Refusing a defensive instruction is thus error if the record contains some evidence, from any source, that, when viewed from the actor's standpoint at the time she acted, will support the instruction requested. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017).

2. Self-Defense and Defense of Third Person.

Absent provocation or other criminal activity (neither of which is alleged here), a person may use force against another when and to the degree the person reasonably believes that force is immediately necessary to protect herself against the other's use or attempted use of unlawful force. TEX. PENAL CODE § 9.31(a) (West 2015). A person may use force to protect a third person when and to the degree she reasonably believes that intervention is immediately necessary to protect the third person. *Id.* § 9.33(1),(2).

A person may use deadly force when and to the degree the person reasonably believes that such force is immediately necessary to defend herself or a third person against another's use or attempted use of unlawful deadly force. *Id.* § 9.32(a)(2)(A). "Deadly force" is the force "known by the actor to cause … [or is] capable of causing, death or serious bodily injury." *Id.* § 9.01(3). A "reasonable belief" is a belief "that would be held by an ordinary and prudent [person] under the same circumstances as the actor". *Id.* at § 1.07(a)(42).

Likewise, a person may defend herself against "apparent danger" to the same degree she would actual danger, even if the person causing that danger has not used or attempted to use unlawful deadly force against the person. *See, e.g., Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. February 5, 2020)

(stating, "[t]he evidence does not have to show the victim was actually using or attempting to use unlawful deadly force because a person has the right to defend himself against apparent danger as he reasonably apprehends it"); *Dugar v. State*, 464 S.W.3d 811, 818 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (stating, "[t]he only requirement is that the person be justified in acting against the danger as he reasonably apprehends it. The reasonableness of the person's belief is viewed from the person's standpoint at the time he acted").

Finally, if evidence shows that an intruder has unlawfully and with force entered an actor's occupied habitation, then "[t]he actor's belief … that deadly force was immediately necessary … is presumed to be reasonable". TEX. PENAL CODE § 9.32(b)(1)(A) (West 2015).

C. Standard of Review.

Whether a defensive issue is supported by evidence is a sufficiency question that is reviewed *de novo* as a question of law. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). In performing this analysis, an appellate court must view the evidence in the light most favorable to the instruction requested. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).

D. Application of Law to Facts.

1. The Reasoning Advanced by the Court of Appeals.

Here, the court of appeals concluded:

> The only evidence Selectman presented on the need to use deadly force was that [Rollins] and her boyfriend, who Selectman thought was an intruder, were arguing … [and] got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer [that] … Selectman reasonably believed immediate use of deadly force … was necessary [to defend herself or Rollins].

Selectman v. State, 04-18-00553-CR, 2020 WL 1442645, at *3 (Tex. App.—San Antonio March 25, 2020, pet. filed) (mem op., not designated for publication).

2. The Reasoning of the Court of Appeals is Flawed.

The court of appeals concedes appellant believed the man she observed assaulting Rollins inside their own home was an unlawful intruder. *Selectman,* 2020 WL 1442645, at *3 (stating, "[Rollins] and her boyfriend, who Selectman thought was an *intruder*, were arguing … [and] got into in a scuffle") (emphasis added). This finding is consistent with Tracy Thomas' testimony that Rollins admitted "[s]he had a boyfriend … behind Nicole's back" and that appellant "instantly came upstairs to [Rollins'] defense" and "started tussling with him because he was tussling with Erica." (4 RR 126, 129, 150). Given the record includes testimony that an intruder unlawfully and with force entered her occupied habitation, appellant's belief that deadly force was immediately needed to protect herself or Rollins is not — as the court of appeals held — legally unsupported, but rather is presumptively reasonable. TEX. PENAL CODE § 9.32(b)(1)(A) (West 2015).

The jury should have been instructed accordingly.

Indeed, if a home invasion, alone, will justify using deadly force against an unlawful intruder, then such an invasion *plus* an assault of somebody inside that home would no doubt cause an ordinary and prudent person to believe that both women residents were in imminent danger of: murder, sexual assault, aggravated sexual assault, robbery, aggravated robbery, and aggravated kidnapping. Such circumstances, too, render presumptively reasonable appellant's belief that deadly force was immediately necessary. TEX. PENAL CODE § 9.32(a)(2)(B) (West 2015).

To the extent it concluded otherwise, the court of appeals has failed to view the record from "appellant's standpoint when she acted" or in the "light most favorable to the instructions requested." *See Gamino*, 537 S.W.3d at 510 (stating, "[a] court errs in denying a self-defense instruction if there is some evidence … [that,] when viewed in the light most favorable to the defendant, … will support the elements of self-defense"). The opinion below thus conflicts with applicable decisions of this Court, which recognize:

> In resolving the issue before us, we must first keep in mind that we do not apply the usual rule of appellate deference to trial court rulings when reviewing a trial court's decision to deny a requested defensive instruction. … Quite the reverse, we view the evidence in the light most favorable to the defendant's requested submission.

Bufkin, 207 S.W.3d at 782 (Keller, P.J., opining); *accord Dugar*, 464 S.W.3d at 818 (observing, "[t]he reasonableness of a person's belief that force is immediately necessary is viewed from the person's standpoint at the time [she] acted").

Instead, the court of appeals — no less than three [3] times — focuses on either "conflicting," "different," or "disputed" evidence as if it were a circumstance to be taken against appellant. *See Selectman*, 2020 WL 1442645, at *3-4 (stating: [1] "[t]he evidence at trial was conflicting as to who shot Erica and under what circumstances;" [2] "Erica's medical records contain different versions of who shot her;" and [3] "[t]he evidence about … whether she knew 'Mac' was disputed").

It was up to the jury, however, to resolve whether Rollins provided her initial intruder story on April 2, 2015 because she was afraid of appellant, or later abandoned that story because she was afraid of her violent pimp. (4 RR 168, 187, 198-215). It certainly wasn't the lower courts' place to pick and choose which of Rollins' various versions of events to accept or reject. *See, e.g.*, *Gamino*, 537 S.W.3d at 512-513 (stating, "it was the jury's call as to whom to believe and what to believe. It was not the trial court's prerogative to preempt the issue because it thought Appellant's version was weak, contradicted, or not credible"); *Elizondo*, 487 S.W.3d at 196 (noting defensive evidence may be sufficient even if it's weak, contradicted, or disbelieved by the court).

To support its opinion that appellant did not reasonably believe deadly force was immediately necessary, the lower court cites *Hunter v. State*, 2019 WL 2521721, at *6 (Tex. App.—Dallas June 19, 2019, pet. ref'd). But, in that case Lonzell Hunter shot and killed a mother of two [2] — in a parking lot — simply because she refused to let go of a cell phone that Hunter and others were trying to steal. *See Hunter*, 2019 WL 2521721, at *6 (stating, "[even viewing] the evidence in the light most favorable to the requested submission, we conclude an ordinary and prudent person in appellant's circumstances could not have reasonably believed deadly force was immediately necessary to protect himself against another's use or attempted use of deadly force"). Here, the instant record reflects that appellant defended herself against a violent stranger in her own home, where use of deadly force is presumptively reasonable. *Hunter* is thus inapposite.

E. Conclusion on Ground for Review No. 1.

Because the court of appeals has misconstrued: (1) the "apparent danger" and "reasonable belief" elements of Penal Code §§ 9.31; 9.32; & 9.33; and (2) failed to view the instant record either from appellant's standpoint on April 2, 2015, or in the light most favorable to the instructions requested, appellant's first ground should be sustained and a new trial ordered.

Ground for Review No. 2

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the confession and avoidance doctrine because: (1) appellant never "flatly denied" an essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could rationally find that appellant either did fire, or otherwise cause, the shot that injured the complainant here.

A. Guiding Legal Principles.

The guiding legal principles set forth in appellant's first ground for review apply equally to this ground. Those same principles are thus incorporated by reference as if set forth verbatim.

B. Application of Law to Fact.

1. The Reasoning Advanced by the Court of Appeals.

The court of appeals has also concluded:

> The only evidence Selectman presented on the need to use deadly force was that … [Rollins and a man] who Selectman thought was an intruder, were arguing … [and] got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer … Selectman shot the gun and admitted to her otherwise illegal conduct[.]

Selectman, 2020 WL 1442645, at *3.

2. The Reasoning of the Court of Appeals is Flawed.

The court of appeals essentially declared the instant record insufficient to satisfy this Court's confession and avoidance doctrine. For several reasons, however, the intermediate appellate court's reasoning is flawed.

Simple assault occurs when a person intentionally, knowingly, or recklessly causes bodily injury to another. Aggravated assault — as alleged here — occurs when, incident to act of simple assault, a person causes serious bodily injury to a household, dating, or family member. No separate *mens rea* requirement applies to the "serious bodily injury" element of an aggravated assault charge. *Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018). Thus, to prove its case here, the State only had to show that serious bodily injury *happened*, incident to an act of simple assault.

That said, if the State does not need to prove a defendant desired, contemplated, or risked causing serious bodily, then neither should a defendant have to "admit" any of those things to satisfy the confession and avoidance doctrine. To secure a self-defense instruction, the evidence of record — which may come from any source — need only show the defendant incidentally caused serious bodily injury during an act of simple assault. *See*, *e,g*, *Rodriguez*, 538 S.W.3d at 629 (recognizing the gravamen of simple assault and aggravated assault are exactly the same; the only difference is an incidental *result* of serious bodily injury); *Ebikam v. State*, 2020 WL 3067581 (Tex. Crim. App. 2020) (holding, "a defendant claiming self-defense who admits an assault by a different manner and means than that alleged in the charging instrument will [nevertheless] be entitled to a self-defense instruction so long as his admission pertains to the same event").

Notably, in addition to the five [5] Judges included in the *Ebikam* majority, the members of this Court who joined in the dissenting and concurring opinions (filed by Newell, J. and Yeary, J.), all seem to agree that, as a construct, confession and avoidance typically has less to do with the absence of an "adequate confession" as it does the presence of an "inconsistent denial". *See, e.g*, *Ebikam*, 2020 WL 3067581, at *3 (Keel, J., opining) (noting, "in order for a defendant to be entitled to an instruction on a justification defense, his evidence [simply] cannot *foreclose* commission of the conduct in question") (emphasis added); *Ebikam*, 2020 WL 3073791, at *1 (Newell, J., concurring) (stating, "the terminology of 'confession and avoidance' has become a little misleading. Though we refer to the doctrine of 'confession and avoidance,' the Court correctly holds that our precedent does not require an actual 'confession' by a defendant to entitle him to a jury instruction on self-defense … So, if there is no real 'confession' requirement, then there certainly can't be, as the court of appeals held, a requirement that a defendant confess to a particular manner and means"); *Ebikam*, 2020 WL 3073792 at *1 (Yeary, J., dissenting) (emphasizing, "[a]bsolutely nothing in [our] statutory scheme requires the defense to concede the elements of the offense, in whole or in part, before the defendant may be entitled to a justification defense. Nor should his steadfast denial necessarily result in the refusal of a justification instruction — so long as there

is other evidence in the record from which a jury could rationally conclude: 1) the defendant did indeed commit the elements of the offense charged, notwithstanding his denial; but also, 2) he was justified in doing so under Chapter 9 of the Penal Code").

What's more, if the culpable *mens rea* for simple assault is all that must be shown to prove (or to defend against) an aggravated assault charge, then there should also be no requirement that the victim of a simple assault necessarily be the same victim who may merely have *incidentally* suffered the serious bodily injury needed to sustain an aggravated assault charge. *Cf. Rodriguez*, 538 S.W.3d at 629 (explaining the gravamen of simple assault and aggravated assault are exactly the same; the only difference is the *result* of serious bodily injury); *see also* TEX. PENAL CODE § 6.04(b)(2) (West 2015) (providing, "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person or property was injured, harmed, or otherwise affected"). Which is to say, when satisfying the confession and avoidance doctrine, the natural implications of our Penal Code's "transferred intent" provisions must apply equally to both sides. As such, so long as some evidence shows that: (1) the listed victim in the State's indictment suffered serious bodily injury; (2) incident to a simple assault the defendant either

admits, or at least does not "flatly deny," then it may not be said that appellant has "foist upon the State a crime that the State did not intend to prosecute". *Ebikam*, 2020 WL 3067581, at *4 (Keel, J., opining); *see also Id.* (noting instruction on self-defense is required so long as: (1) "[the evidence relied upon by the defense] pertains to the same event [as the offense charged"] and (2) "[any variance between defensive pleadings and proof] do not convert the [admitted] offense into a different one than was pled").

Here, as noted, Rollins, herself, told Tracy Thomas that appellant assaulted "a boyfriend [who Rollins] was messing with behind Nicole's back," and as a result of that simple assault, Rollins was shot in the arm. (4 RR 126). Who exactly who had the gun when it went off is immaterial because: (1) Rollins is the same person listed in the State's indictment; and (2) Rollins further admitted she was only injured after — and thus at least arguably because — appellant intervened to protect both herself and Rollins from a reasonably apparent threat of imminent serious bodily injury or death. *See Ebikam*, 2020 WL 3067581, at *4 (Keel, J., opining) (noting evidence of alternative manner and means may still support an instruction on self-defense).

Moreover, even if some evidence that appellant fired the actual shot in question was legally necessary, that evidence could come from any source. Here, Iris Mata testified that appellant's hands were swabbed on April 2, 2015, [4 RR 7, 60-61],

and forensic scientist Christina Vachon testified that she found antimony, barium, and lead on those swabs. (4 RR 82, 93). Vachon thus concluded, "Nicole Patrice Selectman … may have discharged a firearm, handled a discharged firearm, or was in close proximity to a discharging firearm [on April 2, 2015]"). Nothing offered by the defense "flatly denied" this conclusion. The record thus contains ample evidence from which a jury could rationally find that appellant either did fire, or otherwise cause, the shot that injured Rollins.

To the extent the it held otherwise, the court of appeals is simply mistaken. *Gamino*, 537 S.W.3d at 510; *Shaw*, 243 S.W.3d at 657-58; *Ebikam*, 2020 WL 3067581, at *4. When viewed appropriately from both appellant's perspective at the time she acted, and in the light most favorable to the instructions requested, a properly instructed jury could well find that appellant's conduct was justified because Erica Rollins was better off being injured by a friend than being killed by an intruder.

C. Conclusion on Ground for Review No. 2.

Given that: (1) the record contains sufficient evidence to support a rational jury finding that appellant acted reasonably to defend herself or Erica Rollins; and (2) nothing offered by the defense below served to "foreclose" or to negate the defensive instructions requested, appellant's second ground should be sustained and a new trial ordered.

Ground for Review No. 3

The intermediate appellate court effectively substituted its own harm analysis for findings of fact by a properly instructed jury. (4 RR 221-227).

A. Guiding Legal Principles For Harm.

This Court has held:

> When jury charge error is preserved at trial, the reviewing court must reverse if the error caused some harm. "Some harm" means actual harm and not merely a theoretical complaint. There is no burden of proof associated with the harm evaluation. Reversal is required if the error was calculated to injure the rights of the defendant. The harm evaluation entails a review of the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel, and other relevant information. The harm evaluation is case-specific.
>
> Failure to instruct on a confession-and-avoidance defense is rarely harmless because its omission leaves the jury without a vehicle by which to acquit a defendant who has [either] admitted to all the elements of the offense [or at least not flatly denied any of those elements].
>
> Self-defense and necessity are confession-and-avoidance defenses.

Rogers v. State, 550 S.W.3d 190, 191-92 (Tex. Crim. App. 2018) (citations omitted).

B. Application of Law to Fact.

1. The Reasoning Advanced by the Court of Appeals.

The court of appeals found the instant error harmless because: (1) counsel touched on self-defense, defense of others, and the "castle doctrine" in his various remarks to the jury; (2) the jury heard all the testimony that raised the defenses requested below; and (3) the trial court defined all the various mental states the

State could rely upon for conviction. *See Selectman,* 2020 WL 1442645, at *4 (stating, "we cannot say any error in denying Selectman's request for defensive instructions was harmful"). In reaching this conclusion, the court of appeals effectively held no harm occurred here simply because a verdict of guilt was eventually secured. *See Selectman,* 2020 WL 1442645, at *4 (claiming, "[h]ad the jury believed the evidence [raising the defenses raised below] … it would not have found that Selectman intentionally, knowingly, or recklessly caused Erica serious bodily injury").

2. The Reasoning of the Court of Appeals is Flawed.

The court of appeals has essentially ruled that, even if properly instructed, the instant jury would have rejected appellant's defenses. This is dangerous logic that could be used to ignore even the most well-supported of defensive issues. Indeed, under the harm standard applied below, a new trial is necessary only when the *court of appeals* believes proper jury instructions would have resulted in an acquittal. Such harm analysis usurps the fact-finding function of the jury.

It also pays little heed to just how different the instant jury charge would've actually (not just theoretically) been if it had included proper instructions on self-defense and defense of a third person. Such a charge would have explicitly: (1) invited the jurors to consider whether appellant's conduct was *not* criminal,

because it was justified; and (2) avoided a conviction if even a single juror held a reasonable doubt about the defenses raised at trial. *See*, *e.g.*, *Ebikam*, 2020 WL 3073792 (Yeary, J., dissenting) (noting, "[a] justification defense does not deny any element of the charged offense. Instead, it justifies what would otherwise constitute a prosecutable offense; it creates a defense to prosecution, a reasonable doubt about which will require the jury to acquit"); *Vanbrackle v. State*, 179 S.W.3d 708, 714 (Tex. App.—Austin 2005, no pet.) (stating, "the evidence clearly supports a finding that … appellant struggled with Weston to defend himself … [and the instant error is harmful] because the jury needed only to have a reasonable doubt as to whether appellant's actions were justified by self-defense to render an acquittal").

To support its harm analysis, the intermediate appellate court cites *Braughton v. State*, 569 S.W.d 592, 613 (Tex. Crim. App. 2018). But, that case is distinct because there the jury *did* receive proper instructions about when defensive force is presumptively reasonable. *See Braughton*, 569 S.W.d at 607 (acknowledging, "Appellant does not raise a complaint that the jury instructions [the trial court gave] on self-defense were erroneous … and the instructions reflect that they were correctly instructed"). Thus, the only issue there was "whether the jury was irrational in rejecting appellant's defensive claims under these circumstances." *Id.* As such, *Braughton* involved a completely different type of claim.

Instead, *Rogers* is much more squarely on point. *See Rogers*, 550 S.W.3d 192 (stating, "[f]ailure to instruct on a confession-and-avoidance defense is rarely harmless … [and harm occurred here because] it is not inconceivable that a juror would have harbored a reasonable doubt about Appellant's guilt if given an opportunity to consider the defensive issues [raised below]").

Finally, the court of appeals failed to consider that this was the second time the State tried this case, and the first jury hung with only a single vote favoring guilt. It's thus not at all inconceivable that, had it only been properly instructed, the instant jury could well have acquitted appellant here. Appellant has thus been harmed.

C. Conclusion on Ground for Review No. 3.

Given the harm analysis offered below conflicts with applicable decisions of this Court, and effectively substitutes the court of appeals' opinion for actual findings of fact by a properly instructed jury, appellant's third ground should be sustained and a new trial ordered.

PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays the Honorable Court of Criminal Appeals of Texas reverses the judgements below and remands this case for a new trial.

Respectfully submitted,

/s/ *Dean A. Diachin*

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CERTIFICATE OF COMPLIANCE

Appellant hereby certifies this brief was generated by computer, and thus is limited to fifteen-thousand (15,000) words. The "word count" function within Microsoft Word 10.0 indicates this brief consists, in relevant part, of no more than 4,855 words. The brief therefore complies with TEX. R. APP. 9.4(i)(2)(B) (West 2019).

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above and foregoing motion has been e-served upon: (1) Bexar County District Attorney's Office, Appellate Division, 101 W. Nueva St., San Antonio, TX 78205; and (2) State Prosecuting Attorney's Office, 209 W. 14th Street, Austin, TX 78701 on July 28, 2020.

/s/ *Dean A. Diachin*
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Appendix A.

Court of Appeals
(Fourth Court of Appeals District)

Memorandum Opinion
(Not Designated for Publication)

Delivered & Filed:
03-25-20.

2020 WL 1442645

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

DO NOT PUBLISH
Court of Appeals of Texas, San Antonio.

Nicole Patrice SELECTMAN, Appellant
v.
The STATE of Texas, Appellee

No. 04-18-00553-CR
|
Delivered and Filed: March 25, 2020

From the 144th Judicial District Court, Bexar County, Texas, Trial Court No. 2015CR9689, Honorable Lorina I. Rummel, Judge Presiding

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Sitting: Sandee Bryan Marion, Chief Justice, Rebeca C. Martinez, Justice, Luz Elena D. Chapa, Justice

MEMORANDUM OPINION

Opinion by: Luz Elena D. Chapa, Justice

***1** Nicole Selectman appeals her conviction for aggravated assault. She argues the trial court erred by admitting evidence over her chain-of-custody objection and in violation of her confrontation rights, and by denying her request to submit jury instructions on self-defense and defense of another. We affirm the judgment of conviction.

PROCEDURAL BACKGROUND

Selectman was indicted for the aggravated assault of her ex-girlfriend, Erica. Selectman pled not guilty and the case proceeded to a jury trial. The evidence at trial showed Erica and Selectman were living together in Erica's house in Converse, Texas, even though their relationship had ended. On April 2, 2015, Erica was shot in her left arm by someone in her home.

There is conflicting evidence as to who shot Erica. Erica testified Selectman shot her during an argument the two had about Erica evicting Selectman. Other evidence showed Erica reported an intruder had entered her house. And, there was testimony showing Erica and her fiancé, boyfriend, or ex-boyfriend "Mac" were at the house arguing about money, Mac and Selectman had a "scuffle," and a gun "went off" hitting Erica's arm.

During trial, the court admitted evidence, over Selectman's objection, showing Selectman had gunshot residue on her hands. The jury found Selectman guilty and assessed a punishment of ten years in prison. The trial court then imposed Selectman's punishment in open court. After the trial court signed the judgment of conviction, Selectman filed a timely notice of appeal.

ADMISSION OF GUN RESIDUE EVIDENCE

Selectman argues the trial court erred by admitting evidence regarding the gunshot residue test and the test's results over her chain-of-custody and confrontation objections. At trial, City of Converse officer Iris Mata testified she observed a lieutenant obtain a sample from Selectman's hands for gunshot residue testing. A Bexar County forensics scientist testified about the results of the test, concluding Selectman had gunshot residue on her hands.

A. Standard of Review

We review "a trial court's admission of evidence under an abuse of discretion standard." *Watson v. State*, 421 S.W.3d 186, 189 (Tex. App.—San Antonio 2013, pet. ref'd). "The trial court does not abuse its discretion by admitting evidence unless the court's determination lies outside the zone of reasonable disagreement." *Id.* at 190.

B. Chain of Custody

"A chain of custody is sufficiently authenticated when the State establishes the beginning and the end of the chain of custody, particularly when the chain ends at a laboratory." *Id.* (internal quotation marks omitted). "Links in the chain may be proven by circumstantial evidence." *Id.* Selectman argues the chain of custody was not established because the lieutenant who administered the test did not testify. However, the trial court admitted the gunshot residue test kit with the chain of custody noted on it, Mata testified she saw the lieutenant take the sample from Selectman's hands, and other evidence showed the kit included the sample the lieutenant had taken from Selectman's hands. Selectman does not challenge the sufficiency of other evidence establishing the chain of custody. We therefore cannot say the trial court's ruling to admit the gunshot residue evidence over Selectman's chain-of-custody objection was outside the zone of reasonable disagreement. *See id.* We overrule this issue.

C. Confrontation

***2** A defendant has a right to confront witnesses who make testimonial statements against her. *State v. Guzman*, 439 S.W.3d 482, 485 (Tex. App.—San Antonio 2014, no pet.). This right extends to lab technicians who analyze sample materials, such as a blood draw, and prepare reports based on that analysis, because those statements are testimonial. *Id.* at 485–88. The right does not extend "to a person who only [obtains sample materials] and has no other involvement in the analysis or testing of [the] sample." *Id.* at 488.

Selectman argues she had a right to confront the lieutenant who obtained the sample from her hands. But the lieutenant is a person who obtained sample materials and had no other involvement in the analysis or testing of the sample. *See id.* Selectman had the opportunity to cross-examine Mata, who observed how the lieutenant obtained the sample, and the Bexar County forensics scientist, who conducted the test and analysis and prepared the report. Because the record does not show the admission of the results of the gunshot residue test violated Selectman's confrontation rights, we overrule this issue.

SUBMISSION OF DEFENSIVE ISSUES

Selectman argues the trial court erred by denying her requested instructions on self-defense and defense of others. "Our first duty in analyzing a jury-charge issue is to decide whether error exists." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). "Then, if we find error, we analyze that error for harm." *Id.*

A. Applicable Law

"The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense." TEX. PENAL CODE § 2.03(c). The trial court must give a requested instruction on every defensive issue raised by the evidence regardless of the source, strength, or credibility of that evidence. *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013). Even a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense. *Id.*

"Whether a defense is supported by the evidence is a sufficiency question reviewable on appeal as a question of law." *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). When reviewing a trial court's decision denying a request for a defensive issue instruction, we view the evidence in the light most favorable to the defendant's requested submission. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017).

A person is justified in using force against another when and to the degree that person reasonably believes the force is immediately necessary to protect herself against another person's use or attempted use of unlawful force. TEX. PENAL CODE § 9.31. Deadly force is justified if a person would be justified in using force under section 9.31 and she reasonably believes deadly force is immediately necessary to protect herself against another's use or attempted use of deadly force. *Id.* § 9.32.

A person is justified in using deadly force to protect a third person if: (1) she would have been justified in using deadly force to protect herself against the unlawful deadly force she "reasonably believes to be threatening the third person [s]he seeks to protect," and (2) she "reasonably believes ... intervention is immediately necessary to protect the third person." *Id.* § 9.33. "Reasonable belief" is defined as a belief that would be held by an "ordinary and prudent" person "in the same circumstances as the actor." *Id.* § 1.07(a)(42).

B. The Evidence

***3** The evidence at trial was conflicting as to who shot Erica and under what circumstances. Erica testified that on the morning of April 2, 2015, she and Selectman had an argument after Selectman came home from work. Erica had asked Selectman to move out of the house, and Selectman refused. Erica testified she went to the police station and sought help with evicting Selectman, and then came back home. Erica further testified Selectman started asking her whether she was "talking to" or "sleeping with" anyone else and, after Erica denied doing so, Selectman accused her of lying.

According to Erica, Selectman grabbed a gun and shot Erica. Erica went to the restroom and locked the door; Selectman banged on the door, which Erica eventually opened; and Erica allowed Selectman to look through her phone messages. Erica further testified Selectman pointed the gun to her head and threatened to kill her. Erica also stated that when Selectman refused to call for medical help, Erica agreed to tell the police an intruder came into the house and Selectman saved her. Selectman drove Erica to the hospital. Erica testified she initially told hospital staff that an intruder came into her home and she was shot, but then, after Selectman was no longer in the room, told a nurse Selectman had shot her.

Erica's medical records contain different versions of who shot her. One version is that "she was shot by a stranger in her house after leaving door unlocked." Another version is that Erica was shot "by a familiar acquaintance" and "then held at gunpoint for another 30 minutes." And another version is that Erica "was shot ... by her ex-boyfriend."

Selectman sought to prove her theory of the case through the testimony of Tracy Thomas, a friend of both Erica's and Selectman's. Thomas testified Erica had told her that Selectman "was in trouble for something that she didn't do," and she "had a boyfriend behind [Selectman's] back." Thomas further testified Erica said that on the day of the incident, Erica "and her boyfriend were arguing about money" at Erica's house. When Selectman came home, she "instantly came upstairs to [Erica's] defense because she didn't know what was going on and I guess there was a gun involved and the gun went off in the middle of the struggle." Thomas stated Erica did not say who had the gun, but said Erica's boyfriend threatened to kill Erica if she did not testify against Selectman. According to Thomas, Erica had said Selectman "came upstairs and started scuffling with the boyfriend and in the midst of that the gun went off." Thomas also stated, "I've been through a similar situation to be afraid of someone and it will drive you to lie, because I've done it. I've been shot by my ex-husband, lied about who shot me because I was afraid of him."

C. No Error

We hold the trial court did not err by denying Selectman's request for instructions on self-defense and defense of another. The only evidence Selectman presented on the need to use deadly force was that Erica and her boyfriend, who Selectman thought was an intruder, were arguing about money, and she and Erica's boyfriend got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer: (1) Selectman shot the gun and "admit[ted] to [her] otherwise illegal conduct; and (2) Selectman reasonably believed immediate use of deadly force—shooting at Erica's boyfriend or an intruder, but missing and hitting Erica—was necessary for the defense of herself or of Erica. *Jordan v. State*, No. PD-0899-18, 2020 WL 579406, at *1 (Tex. Crim. App. Feb. 5, 2020); *accord Hunter v. State*, No. 05-18-00458-CR, 2019 WL 2521721, at *6 (Tex. App.—Dallas June 19, 2019, pet. ref'd) (mem. op.) (holding evidence of a "tussle" and "scuffle" did not justify the use of deadly force in defense).

D. No Harm

***4** Alternatively, we hold that any error in not submitting the defensive instructions was harmless. "When, as here, the defendant has preserved error by requesting the challenged instruction, we reverse the conviction if the denial of the instruction resulted in some harm to the defendant." *Braughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018). " 'Some harm' means actual harm and not merely a theoretical complaint." *Id.* In considering harm, the degree of harm must be assessed in light of the record of the trial as a whole. *See id.*

During voir dire, defense counsel noted the existence of legal justifications for the use of deadly force, such as self-defense, defense of another, and the Castle Doctrine. In his opening statement, Selectman's counsel told the jury that the defense witnesses' testimony would show Erica was lying to protect her boyfriend, who had threatened her if she did not testify against Selectman. The opening statement was vague as to whether Selectman's theory of the case was that Selectman or Erica's boyfriend actually shot the gun.

The evidence about who shot Erica, under what circumstances, and whether she knew "Mac" was disputed. Thomas's testimony was vague, but the

defense's evidence and trial counsel suggested an intruder or Erica's boyfriend shot Erica. The trial court admitted photographs of the inside of Erica's house from the day of the incident, and the photographs showed blood in the restroom and on the carpet outside of the restroom. The photographs did not appear to support one side's theory of the case more than the other side's theory. Erica's neighbor testified he was outside smoking a cigar during the approximate timeframe of the incident. He stated he saw Selectman come and go from the house, but never saw Erica.

The jury charge instructed the jury on the mental states required for aggravated assault: intentionally, knowingly, and recklessly. During closing argument, Selectman argued that if she shot Erica, it was during a "scuffle" or "tussle" during which she was trying to defend Erica. Had the jury believed the evidence, this explanation would have negated the required mental states. In other words, had the jury believed Thomas's testimony, it would not have found that Selectman intentionally, knowingly, or recklessly caused Erica serious bodily injury. Considering the relevant parts of the record, we cannot say any error in denying Selectman's request for defensive instructions was harmful. *See* TEX. R. APP. P. 44.2(b).

CONCLUSION

We affirm the judgment of conviction.

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